United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: September 30, 1997

Case No. **95 INA 475**

In the Matter of:

CONSTANTE GIL, M.D.,
Employer,

On behalf of:

WALTER A. ZAVALA,
Alien.

Appearance: C. A. Grutman, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of WALTER A. ZAVALA (Alien) by WALTER A. ZAVALA (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions

of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On November 22, 1993, Employer, Constante Gil, M.D., filed for labor certification on behalf of the Alien, Walter Zavala, to fill a position classified in the DOT as "Physician. AF 15. The occupational title listed in the application was "Internist." AF 15. The qualifications required by the Employer were a medical degree and two years of experience in the job offered. Four U.S. workers applied for the job. The Employer later reported that three of the U.S. applicants were not interested in the job offered, however, and that the fourth applicant failed to attend the scheduled interview or to respond to his repeated followup telephone calls.

1. In the Notice of Findings (NOF) of October 31, 1994, the Certifying Officer (CO) described the Alien's occupation as "Internist." AF 56. Explaining that the regulations provide that an application for an alien physician or surgeon must be accompanied by certain documentation, the CO directed this Alien to present documentary evidence that he had passed the Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS). The CO added that the job qualification of two years of experience does not reflect the requirements normally required for the performance of this position in the United States. Noting that, "This position normally requires the completion of a three year residency in internal medicine, which should be entered in item 14, ETA750A under 'training,'" the CO observed that compliance with Employer's two year experience requirement is not an acceptable substitute for completion of a professional residency. Also, the CO noted, professional licensure by the State of New Jersey or eligibility for a physician's license also is required. The CO said this deficiency could be rebutted by amending the Employer's requirements to include the residency and license requirements or by evidence proving that its two year experience requirement arises from business necessity under the Act and regulations.

2. The CO then said that the newspaper advertisements and posted notices announced that the position was located in Newark, New Jersey, rather than Perth Amboy, New Jersey. The CO stated the use of an incorrect job location resulted in an inadequate test of the labor market for this position. The CO explained that the Employer could rebut by indicating its willingness to

readvertise and re-post the job opportunity after correcting this defect.

3. Finally, the CO required the Employer to present evidence describing the circumstances of his failure to attempt to contact one U.S. applicant, Dr. Lock, whom he was unable to reach by telephone. The CO also directed the Employer to present evidence proving that his rejection of Ahmed E. Halima and Abraham J. Lock was for reasons that were lawful and job related.

By way of rebuttal, the Employer then submitted the Alien's FMGEMS certificate of March 17, 1992, and the Alien's New Jersey medical license, which was dated August 8, 1994. Also, the Employer amended the qualifications stated in the application to require a residency in internal medicine and/or cardiology, but did not delete the requirement of two years' experience. The Employer also submitted documentation to demonstrate that the Alien had completed a three year cardiology residence. Finally, the Employer declared that he was willing to readvertise the job and submitted a copy of the revised job posting. The revised posting continued the error of describing the job incorrectly as being located in Newark, New Jersey, however. AF 62.

The Employer reiterated his earlier statements as to the U. S. applicants, asserting that Dr. Ahmed Halima was not interested in the job opportunity and Dr. Lock had failed to appear at a job interview. The Employer said its rejection of Dr. Lock on the grounds that he failed to attend the scheduled interview without explanation was a lawful job related reason within the meaning of the regulation. AF 71.

The CO's Final Determination of January 10, 1995, accepted as adequate both the Employer's rebuttal evidence of the Alien's FMGEMS certification and its reasons for rejecting the U. S. job applicants. The CO found that the Employer failed to rebut the issues raised under 20 CFR § 656.21(b)(2), however. The CO then observed that Employer had amended the qualifications to require a three year residency in internal medicine and/or cardiology. The CO said cardiology is a sub-specialty of internal medicine in the U. S. and that the position of cardiologist is a separate category in the DOT. Based on these reasons, the CO concluded that Employer's requirements for the job of Internist were not consistent with the normal qualifications for the position in the U. S. labor market.

The CO then added that the alien's state medical license was granted after the date that the Employer applied for alien labor certification, and that the job posting continued to show the job location incorrectly at Newark, New Jersey.

The Employer did not question the use of "Internist" as the job title and assert that the position he offered was that of a

"Physician" until he moved for reconsideration of the denial of labor certification on February 14, 1995. AF 84. The common requirement in the U. S., said the Employer, is that a physician have an academic medical degree and license to practice medicine, arguing that it is not necessary that the doctor complete an internal medicine residency, as well. Employer further argued that the Alien's qualification for a license at the time of application was sufficient, since he later became licensed. Finally, asserting that the incorrect description of the location of the job was a clerical error, the Employer proposed that it again post an announcement of the position with a corrected job location. AF 84.

The CO denied Employer's motion for reconsideration on March 21, 1995, as reconsideration of the denial of certification can only address issues which could not have been taken up in the rebuttal. The CO then referred this application for review.

Discussion

20 CFR § 656.26(b)(4) provides that the request for BALCA review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." Only after the final determination was issued did the Employer present its argument that the position was for a Physician and not Internist and that an added requirement for professional training should not have been included. Instead of raising this issue on rebuttal, the Employer amended his labor certification application. As a consequence, the CO correctly concluded that Employer's amendment of the application on Rebuttal exceeded the amendments suggested in the NOF and that the qualifications stated in the amended application were greater than those normally required for the position of Internist in the U. S.

The Employer was adequately informed that the CO considered this to be a position for an Internist, and the Notice of Findings stated the Alien's occupation as Internist and the NOF text explicitly addressed the professional requirements for an Internist, including a residency in internal medicine. The Board will not consider an argument raised after the Final Determination where, as in this case, it is an untimely addition of new reasons to support its rebuttal of the CO's findings in the Notice of Findings. **Huron Aviation**, 88 INA 431 (July 27, 1989).

Employer's failure to state as job requirements the criteria normally required for the hiring of an internist in the U. S. as discussed by the CO in the NOF and Employer's failure to address its restrictive requirement of two years of experience are sufficient grounds for affirming the CO's findings, which the Employer does not dispute. **Belha Corp.**, 88 INA 024(Mar. 5. 1989) (en banc). Accordingly, we conclude that certification was

properly denied.

As alien labor certification was properly denied on the basis of the Employer's failure to rebut the issued raised under 20 CFR § 656.21(b)(2), we will not address either of Employer's contentions concerning (1) the Alien's qualifications for a State license at the time of application or (2) the Employer's offer to re-post the job offer with the correction of the job location.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 475

CONSTANTE GIL, M.D., Employer,
WALTER A. ZAVALA, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 10, 1997